


SCHOLARLY ARTICLE

Sweatshops and Labour Law: The Ethical and Legal Implications of Ignoring Labour Law in Developing Countries

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Abstract

Academic defenders of sweatshops argue that disregarding labour rights will result in increased welfare in the developing nations where transnational corporations (TNCs) operate. They argue that TNCs should ignore local labour laws in the best interests of the poor. In this article we criticise this ‘ignore the law’ position regarding sweatshops on three separate grounds. First, it fails to acknowledge the demands for businesses to respect the rule of law as part of the development process. Second, it utilises an inadequate account of voluntary contractual bargaining which overlooks how employment practises operate in sectors prone to utilising sweatshop labour, leading to coercive employment conditions incompatible with human dignity and free choice. Third, it fails to adequately account for labour law and international labour standards, which embody a strong moral conception of dignity at work and observance of fundamental human rights in protecting workers against abuse through the resulting legal duties placed on states and corporate actors. We conclude that poverty reduction requires the support of both private and public actors. Advocating the side-stepping of labour laws distracts from the important work of institution building necessary to protect workers and facilitate economic growth consistent with decent work, sustainable development, fairness and human dignity as embodied in international labour standards.

Keywords: labor rights; law; contracts; rule of law; sweatshops

There is now a significant body of scholarship debating the merits of sweatshops. In broad terms, there are two distinct camps. Academic critics of sweatshops argue that transnational corporations (TNCs) have duties to respect basic human rights in their global supply chains by partnering with suppliers to ensure that wages and working conditions meet certain normative conditions.¹ They argue that sweatshops are disrespectful of human dignity, take unfair advantage of unjust background conditions and are thereby exploitative. Scholars who defend sweatshops argue that no such TNC duties to protect human rights exist because increased expenses associated with the fulfilment of such duties will result in reduced overall

¹ See, for example, Denis G Arnold and Norman E Bowie, ‘Sweatshops and Respect for Persons’ (2003) 13:2 *Business Ethics Quarterly* 221; Denis G Arnold and Laura P Hartman, ‘Moral Imagination and the Future of Sweatshops’ (2003) 108:4 *Business and Society Review*, 425; Denis G Arnold and Laura P Hartman, ‘Beyond Sweatshops: Positive Deviancy and Global Labor Practices’ (2005) 14: 3 *Business Ethics: A European Review* 206; Denis G Arnold and Laura P Hartman, ‘Worker Rights and Low Wage. Industrialization: How to Avoid Sweatshops’ (2006) 28:3 *Human Rights Quarterly* 676.

welfare in the developing nations in which TNCs operate.² In response, critics of sweatshops have pointed out that a logical extension of the pro-sweatshop position is that labour laws protecting workers should be ignored in the interest of reducing costs and expanding employment.³ Defenders of sweatshops have embraced this criticism and argued that TNCs should ignore local labour laws because doing so is in the best interests of the poor.⁴ This article seeks to open a new avenue for critically examining this view, which we term the ‘ignore the law’ position. As already noted, while the views of academic defenders of sweatshops have been criticised from within the business ethics field and in terms of their economic assumptions,⁵ there has been no attempt that we know of to integrate legal thinking into this critique. This is required given that the law is seen by the pro-sweatshop approach as a possible barrier to worker welfare.⁶ Accordingly, we propose a framework through which legal considerations can be introduced into the wider ethical debate on sweatshops and we conclude that legal considerations demonstrate the inadequacy of the ‘ignore the law’ position.

Encouraging or recommending non-compliance with labour law in developing nations is akin to encouraging or recommending human rights infringements since labour laws help ensure that certain core basic human rights are protected. Such human rights in the workplace are guaranteed by the United Nations International Bill of Human Rights, which encompasses the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) among other international accords including core International Labour Organisation (ILO) Conventions and Declarations.⁷ Given the general acceptance of a business responsibility to respect human rights under the widely adopted United Nations (UN) Guiding Principles on Business and Human Rights (UN Guiding Principles) and other business and human rights instruments, including binding national laws requiring mandatory human rights due diligence (HRDD) on the part of businesses to identify and avoid human rights risks arising from their operations, the ‘ignore the law’ position must be properly scrutinised from a legal perspective.⁸

This requires an initial understanding of the numerous legal sources that show the existence of business obligations, whether legal or voluntary, to avoid and/or mitigate

² See, for example, Gordon Sollars and Fred Englander, ‘Sweatshops: Kant and Consequences’ (2007) 17:1 *Business Ethics Quarterly* 115; Benjamin Powell, ‘In Reply to Sweatshop Sophistries’ (2006) 28:4 *Human Rights Quarterly* 1031; Benjamin Powell and Matt Zwolinski, ‘The Ethical and Economic Case Against Sweatshop Labor: A Critical Assessment’ (2012) 107:4 *Journal of Business Ethics* 449.

³ Denis G Arnold, ‘Working Conditions: Safety and Sweatshops’ in George Brenkert and Tom Beauchamp (eds.), *The Oxford Handbook of Business Ethics* (Oxford, Oxford University Press, 2009) 628.

⁴ Powell, note 2; Powell and Zwolinski, note 2.

⁵ On which see Joshua Preiss, ‘Global Labor Justice and the Limits of Economic Analysis’ (2014) 24:1 *Business Ethics Quarterly* 55.

⁶ Joshua Preiss, ‘Freedom, Autonomy, and Harm in Global Supply Chains’ (2019) 160:4 *Journal of Business Ethics* 881.

⁷ See, e.g., Office of the UN High Commissioner for Human Rights (OHCHR) ‘The International Bill of Human Rights: A brief history, and the two International Covenants’, <https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights> (accessed 26 January 2024). The UDHR Article 23 includes: the prohibition of slavery; the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment; the right to equal pay for equal work; the right to just and favourable remuneration; the right to form and to join trade unions. The ICCPR Article 22 protects the freedom of association and the right to form and join trade unions while ICESCR protects by Article 6 the right to work; by Article 7 the right to enjoyment of just and favourable conditions of work including fair and equal wages for equal work; safe and healthy working conditions; equal opportunity for promotion and rest, leisure and reasonable limitations on working hours and holidays with pay. On ILO standards see section IV below.

⁸ See Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011). For a general introduction to the legal and policy aspects of business and human rights see Peter T Muchlinski, *Advanced Introduction to Business and Human Rights* (Cheltenham: Edward Elgar Publications, 2022).

human rights risks arising from their operations, including risks to fundamental worker's rights. However, this does not address the core ethical problems raised by the 'ignore the law' position. That requires an understanding of how these more recent legal developments themselves embody an ethical philosophy that renders ignoring legal requirements to protect human dignity at work unethical. Although trying to identify the philosophical foundations of labour law and international labour standards is not easy,⁹ as will be developed in the ensuing sections, certain persuasive arguments can be made to show that these legal standards do embody an approach to human dignity and development which is preferable to the narrow welfarist views of the 'ignore the law' position.

In the process, we assume that 'development' means more than just economic wealth maximisation. Indeed, such a narrow economic view of development appears to us rather unhelpful. As Preiss notes,

The economic case fails to address many of our central concerns for sweatshops because, as applied ethics, economics presents an impoverished view of relationships. The economic case implies that mutually beneficial exchanges in the status quo are good things. For many, however, the ethics of relationships entails more than this, and includes values that may take precedence over instrumental benefits to welfare.¹⁰

Our arguments below accept this criticism and seek to show that legal standards embody values that not only consider economic welfare but also human dignity and the avoidance of coercive exploitation as essential goals of labour rights.¹¹

In part one of this article, we outline the 'ignore the law' argument. In part two we develop fairness and welfarist-based objections to the 'ignore the law' argument based on the notion that obeying legitimate rules of law enhances these objectives and is compatible with the growing consensus that private business actors must uphold the rule of law as part of their contribution to fair and sustainable development in developing countries. In part three we argue that the 'ignore the law' argument uses a crude model of the freely negotiated contract to justify worker acceptance of sweatshop working conditions that is at odds with not only contractual theory but, more importantly, the reality of employment practises in sectors prone to the use of sweatshop labour which have prompted the development of corrective rules and practises to minimise adverse impacts on workers dignity, safety and well-being. Finally, in part four we argue that it is wrong to suggest that corporate actors can 'ignore the law' that demands their conformity with national labour laws and fundamental international labour rights when the states in which they do business cannot opt out of their legal duties to make them comply with such laws and which, in turn, create an internationally accepted 'floor of rights' based on strong ethical and moral expectations as to the treatment of workers.

1. The 'Ignore the Law' Argument and Sweatshops

The term 'sweatshop' has no legal meaning as such.¹² However, the United States Government Accountability Office specifically invokes non-compliance with two or more

⁹ On which see Hugh Collins, Gillian Lester, and Virginia Mantouvalou (eds.), *Philosophical Foundations of Labour Law* (Oxford: Oxford University Press, 2018).

¹⁰ Preiss (2014), note 5, 74.

¹¹ See further Pablo Gilabert, 'Dignity at Work' in Collins, Lester, and Mantouvalou (eds.), note 9, 68–86; Jonathan Wolff, 'Structures of Exploitation', in Collins, Lester, and Mantouvalou (eds.), note 9, 175–87.

¹² The term originated from the mid-nineteenth century encompassing a system of work in the garment trade based on outsourcing labour through a middleman or 'sweater' who subcontracted work to workers who worked in

labour laws as defining a sweatshop.¹³ Hartman, Shaw and Stevenson reviewed global labour standards in a range of codes and documents and determined that the following basic labour rights were common among them:

- just and favourable working conditions, including a limit to the number of hours a human should have to work each day and a healthy working environment;
- minimum age and working conditions for child labour;
- non-discrimination requirements regarding the relative amount that a worker should be paid and the right to equal pay for equal work;
- freedom from forced labour;
- free association, including the right to organise and to bargain collectively in contract negotiations.¹⁴

The academic debate regarding the moral status of sweatshops may be traced to a pair of articles published over twenty years ago. The libertarian Ian Maitland took the position that the imposition of wages and working conditions above free market rates would result in increased unemployment and thus harm workers.¹⁵ Kantians Denis Arnold and Norman Bowie took the position that respect for workers required wages and working conditions compatible with human dignity.¹⁶ In subsequent years academic authors have tended to side with one or the other of these perspectives. Benjamin Powell and Matt Zwolinski have argued in support of Maitland's position and have gone so far as to accuse critics of sweatshops of mounting sophistic arguments.¹⁷ In response, Joshua Preiss argues that 'economic analysis is largely irrelevant to numerous popular philosophical concerns for the ethics of sweatshops' and that 'the economic case for sweatshops ... remains willfully obtuse to the relevance of conditions of background or structural justice to sweatshop exploitation.'¹⁸ Michael Kates argues that a prominent claim made by proponents of sweatshops, namely that it is wrong to interfere with workers' choice to work in sweatshops, fails on its own terms. He argues that 'legal regulation can help workers realise their choice in situations in which they are effectively prohibited from doing so via individual action alone.'¹⁹ We concur with Preiss and Kates and take the position that the

arduous conditions. The UK House of Lords Select Committee on the Sweating System, in its Report of 1890, described 'sweating' as involving, '(1) an unduly low rate of wages; (2) excessive hours of labour; (3) the insanitary state of the houses in which the work is carried on.' See Beatrice Potter, 'The Lords and the Sweating System' (1890) 27:160 *The Nineteenth Century* 885–905. In the U.S. context see further Daniel E Bender and Richard A Greenwald (eds.), *Sweatshop USA: The American Sweatshop in Historical and Global Perspective* (New York and London: Routledge, 2003).

¹³ The United States Government Accountability Office defines a sweatshop as 'an employer that violates more than one federal or state labor law governing minimum wage and overtime, child labor, industrial homework, occupational safety and health, worker's compensation or industry regulations.' United States General Accounting Office, *Garment Industry: Efforts to Address the Prevalence and Conditions of Sweatshops* (Washington: GAO, 1994). See further Jacqueline Hayes, 'Toward a Redefinition of the U.S. Sweatshop' (2014) 5:2 *Stanford Journal of Public Policy* 39, who argues that a formal legal definition is insufficient to capture the conditions of labour exploitation that emerge in the more flexible working environment of the contemporary global economy.

¹⁴ Laura P Hartman, Bill Shaw and Rodney Stevenson, 'Exploring the Ethics and Economics of Global Labor Standards: A Challenge to Integrated Social Contract Theory' (2003) 13:2 *Business Ethics Quarterly* 193.

¹⁵ Ian Maitland, 'The Great Non-Debate Over International Sweatshops' reprinted in Tom L Beauchamp and Norman E Bowie (eds.), *Ethical Theory and Business*, 6th edn. (Englewood Cliffs: Prentice Hall, 2001), 595.

¹⁶ Arnold and Bowie, note 1.

¹⁷ Powell, note 2; Powell and Zwolinski, note 2.

¹⁸ Preiss (2014), note 5.

¹⁹ *Ibid*, 199.

'ignore the law' view is wrong for several reasons which we develop further in the ensuing sections.

The 'ignore the law' position defended by academic proponents of sweatshops challenges the view that corporations have obligations to follow laws which support such rights. More specifically, proponents of the 'ignore the law' position argue that TNCs should ignore local labor laws where this is justifiable on welfare grounds. Representative statements of the position are as follows:

These countries [where sweatshops are located] desperately need economic efficiency if they are going to grow and raise the living standards of their population. This may require violating local labor laws for the overall good of the population.²⁰

the violation of labor laws by sweatshops is indeed sometimes morally justifiable.²¹

The conclusion that ignoring labour laws is justified on welfare grounds should be recommended to TNCs operating in developing nations is based on the following argument. First, while forced labour is always morally impermissible and ought to be prohibited,²² workers freely choose to work in sweatshops and are not forced to do so. Second, adhering to labour laws is costly and the added costs will result in fewer jobs. Fewer jobs in developing nations will result in reduced overall welfare among the poorest members of society. Powell and Zwolinski are explicitly welfarist in their defence of sweatshops.²³ Their concern is with the marginal welfare of sweatshop workers.

We maintain that any nationwide law or regulation that mandates higher wages or health and safety standards, set at a high-enough level to have any effect, will raise the cost of labor and thus end up unemploying some workers and moving them to less desirable alternatives.²⁴

In conclusion, in the interests of job creation, TNCs should often, if not always, ignore local labour laws. Examples might include laws regarding building codes, fire safety, noise pollution, chemical exposure, minimum wages, overtime pay, social security benefits and collective bargaining. In general, any labour law that entails a cost to the employers should be ignored in this view because the funds would be better spent on employing more workers.

The argument depends, therefore, on the assumption that the contract between the worker and employer is entered into voluntarily, without coercion, and on the assumption that the best way of ensuring development is through access to work at nearly any cost, even at the cost of ignoring the law. From a legal perspective, this argument fails on many important levels and poses a real threat to a liberal conception of law. These legal perspectives in turn inform ethical objections to the 'ignore the law' point of view. The main criticisms of the 'ignore the law' argument are summarised here and will be more fully developed below.

First, the 'ignore the law' argument challenges the liberal conception of the rule of law, by making light of non-compliance with the law. It goes against the growing international consensus that corporations ought to act as vehicles for the furtherance of the rule of law in

²⁰ Powell, *note 2*, 1041.

²¹ Powell and Zwolinski, *note 2*, 461.

²² *Ibid*, 462.

²³ *Ibid*, 450.

²⁴ *Ibid*, 457.

the development process because doing so enhances the welfare of citizens.²⁵ In so doing it unjustifiably isolates labour law from a broader legal framework designed to improve welfare. Secondly, the argument uses a crude model of the freely negotiated contract which is at odds with the thinking of legal scholars who use a more sophisticated relational model of contract and appears not to be grounded in the realities of employment practises in sectors prone to sweatshop labour. It also overlooks the coercive aspects of the employment contract which, even if freely entered into, can severely restrict the worker's fundamental rights. Thirdly, the argument does not take into account the nature of labour law and how and why it has developed as a corrective for power imbalances in the bargaining position of workers and employers. It also overlooks the development of international labour standards by the ILO and their impact on development and upon the nature and scope of state legal duties to observe human rights. This, coupled with the acceptance of the UN Guiding Principles of corporate responsibilities to respect human rights, posits a strong moral and ethical condemnation of working conditions and practises that disrespect and undermine workers' freedom and dignity. Because regulations that protect workers are the instantiation of ethical duties regarding the protection of workers' rights the existence of such laws presents a clear rebuke to the 'ignore the law' position. These arguments are further developed below.

II. The Rule of Law Sustainable Development and 'Ignore the Law'

The rule of law means more than merely a duty to obey the law. Indeed, there may be good reasons for civil disobedience that defy calls to observe the law as an end in itself.²⁶ That said, observance of the law is generally a preferable state of existence to its regular disregard. Indeed, ignoring the law would be hard to accept where the laws in question are the product of legitimate governance, and where they contain a basis in moral consensus.²⁷ The question that the 'ignore the law' approach fails to ask, let alone answer, is whether a welfarist approach to the question of sweatshop labour and its morality offers a sufficient basis upon which to disobey labour laws that are, as will be shown in more detail below, the product of many years of experience and which have been endorsed, in principle at least, by many, if not most, countries and global institutions as being *morally* right. Further, we argue that even on welfarist grounds the rule of law approach is superior to the 'ignore the law' approach.

Given that invoking the rule of law is not merely an issue of obedience to the law, how does this concept fit the present case? The rule of law has, traditionally, been seen as having two core aspects: a procedural, or formal, aspect and a substantive aspect.²⁸ The first concentrates on the existence, or absence, of certain features of a legal system that are conducive to good governance including an independent and impartial judiciary, publicly made laws, non-discriminatory, non-retroactive, laws and the existence of judicial review of

²⁵ See further United Nations Global Compact, *Business for the Rule of Law Framework* (New York: UN Global Compact, 2015).

²⁶ See further Richard A Wasserstrom, 'The Obligation to Obey the Law' in Robert S Summers (ed.), *Essays in Legal Philosophy* (Berkeley: University of California Press, 1968) 274; M B E Smith, 'Is there a Prima Facie Obligation to Obey the Law?' (1973) 82:5 *Yale Law Journal* 950–75 'For most people, violation of the law becomes a matter for moral concern only when it involves an act which is believed to be wrong on grounds apart from its illegality'.

²⁷ As noted by Wasserstrom, 'Disobeying the law is often—even usually—wrong; but this is so largely because the illegal is usually restricted to the immoral and because morally right conduct is still less often illegal'. *Ibid.*, 304.

²⁸ See Robert A Stein, 'What Exactly Is The Rule Of Law?' (2019) 57:1 *Houston Law Review* 185–8. See further Michael J Trebilcock and Ronald J Daniels, *Rule of Law Reform and Developing Countries: Charting the Fragile Path of Progress* (Cheltenham: Edward Elgar, 2008); World Bank, *World Development Report 2017* (Washington DC: World Bank, 2017) 95–7.

administrative action. The second looks at outcomes and encompasses the notions of justice and fairness.²⁹ The former focuses mainly on institutional structures and processes and is not of primary concern here, though the existence of a good institutional basis to a legal system is a key element in its ability to deliver fair outcomes and to empower the less powerful through rights of access to justice.

The second element is key to the present issues. At the heart of the 'ignore the law' case is the belief that labour regulation does not provide for fair outcomes, as it denies important job opportunities to otherwise extremely poor people. Indeed, it sees labour regulation as placing the government at the heart of a decision on human welfare which ought to be left to the process of free contractual bargaining. In this sense, the 'ignore the law' argument seeks to limit state intervention in economic relations.

This approach effectively substitutes the judgment of public authorities with the private judgment of the employer who is normally the stronger bargaining party in the employment process relative to the employee.³⁰ It is hard to see how that can be more conducive to the substantive fairness of outcomes, even leaving aside the moral legitimacy of labour regulation for now. It assumes that an employer, seeking the pursuit of private gain, should be trusted more to act morally than a public body that is open to public scrutiny based on its public status. To allow the private entity freedom from regulation in such circumstances is a risk to fair outcomes that no society which believes in the rule of law ought to accept. Thus, as a matter of *fairness*, the rule of law should be upheld. Fairness is an ethical value, and this obligation of fairness further explains how legal arguments can challenge the ethical claims made by proponents of the 'ignore the law' position. This judgment appears to be supported by the international community when issues of business and the rule of law are raised.

First, international law recognises the international rule of law as a vital aspect of global governance. According to Chesterman, international law takes a functional approach to the rule of law.³¹ It has been used to promote human rights, good governance as an aspect of development, and the promotion of peace and security. To achieve such ends Chesterman sees the international rule of law as possessing three essential qualities: non-arbitrariness in the exercise of state power including the development of international protections for human rights and other fields of international norm-setting; acceptance of the supremacy of law by states through greater acceptance of international tribunals and the application of international law to international organisations; and equality before the law which entails the more general and consistent application of international law to States and other entities.³² The reference to other entities envisages that businesses are subject to international legal standards. It is also supported by the process of international norm development in specialised areas, to which the first aspect of Chesterman's analysis pertains, and which includes international labour standards.

²⁹ See generally Ronald Dworkin, *Laws Empire* (Cambridge: Harvard University Press, 1986) and see the insightful review by Gregory C Keating, 'Justifying Hercules: Ronald Dworkin and the Rule of Law' (1987) 12:2/3 *American Bar Foundation Research Journal* 525.

³⁰ See further Hugh Collins, *Employment Law*, 2nd edn. (Oxford: Oxford University Press, 2010) 6–13.

³¹ Simon Chesterman, 'An International Rule of Law?' (2008) 56:2 *American Journal of Comparative Law* 331.

³² *Ibid*, 359–60. See too Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity?' (2016) 65:2 *International & Comparative Law Quarterly* 277–92, who asserts on page 292: 'In addition, the international system is no longer comprised of states alone and so the international rule of law should be defined to allow it to encompass the activities of other participants in the system, such as international organizations, corporations and armed groups'.

Secondly, there is a consensus that the rule of law is a key element in sustainable development.³³ According to the UN, sustainable development aims to, ‘meet the needs of the present without compromising the ability of future generations to meet their own needs’.³⁴ This is achieved through the building of an ‘inclusive, sustainable and resilient future for people and planet’ requiring the harmonisation of three core and interconnected elements: economic growth, social inclusion and environmental protection. To this end eradicating poverty in all its forms and dimensions is indispensable requiring the promotion of ‘sustainable, inclusive and equitable economic growth, creating greater opportunities for all, reducing inequalities, raising basic standards of living, fostering equitable social development and inclusion, and promoting integrated and sustainable management of natural resources and ecosystems’.³⁵

On the rule of law and development, the UN General Assembly has reaffirmed the fundamental importance of the rule of law, ‘for the further development of the three main pillars upon which the United Nations is built: international peace and security, human rights and development’.³⁶ It also made clear that the rule of law implies that, ‘all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law’.³⁷ Thus businesses are seen as having certain obligations of accountability and rights to non-discriminatory treatment.

The link between sustainable development and the rule of law is also present in the UN Sustainable Development Goals (SDGs). Goal 16 aims to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. Among the Goal 16 targets is to ‘promote the rule of law at the national and international levels and ensure equal access to justice for all’.³⁸

To be sure references to sustainable development and the rule of law may be rather general aspirational terms, the precise content of which will be open to discussion.³⁹ Nonetheless, sustainable development provides a generally accepted analytical framework for tackling the major problems facing humanity in the coming decades.⁴⁰ Moreover, as Dernbach and Cheever note, while the SDGs remain non-binding in legal terms their spirit and content are increasingly being turned from a normative conceptual

³³ See Louis Alexander Berg and Deval Desai, ‘Background Paper: Overview on the Rule of Law and Sustainable Development for the Global Dialogue on Rule of Law and the Post-2015 Development Agenda’, Thailand Institute of Justice Forum, Draft (August 2013) 14, https://tijforum.org/wp-content/uploads/2016/11/20130801-READING_Global-Dialogue-Background-Paper-Rule-of-Law-and-Sustainable-Developme....pdf (accessed 26 January 2024); Pilar Domingo, ‘Why Rule of Law matters for development’, ODI *Opinion* 131 (May 2009), <https://cdn.odi.org/media/documents/4192.pdf> (accessed 26 January 2024).

³⁴ United Nations, ‘The Sustainable Development Agenda: What is Sustainable Development?’, <https://www.un.org/sustainabledevelopment/development-agenda/> (accessed 26 January 2024). Originally found in Gro Harlem Brundtland, *Report of the World Commission on Environment and Development: Our Common Future* (Oslo: World Commission on Environment and Development, 1987).

³⁵ *Ibid.*

³⁶ United Nations General Assembly, ‘Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels’, A/RES/67/1 (30 November 2012). See further United Nations, ‘Rule of Law and Development’, <https://www.un.org/ruleoflaw/rule-of-law-and-development/> (accessed 26 January 2024).

³⁷ *Ibid.*, para 2.

³⁸ United Nations and the Rule of Law, ‘Sustainable Development Goal 16’, <https://www.un.org/ruleoflaw/sdg-16/> (accessed 26 January 2024).

³⁹ See further John C Dernbach, and Federico Cheever, ‘Sustainable Development and Its Discontents’ (2015) 4:2 *Transnational Environmental Law* 247.

⁴⁰ *Ibid.*, 250.

framework into written laws aimed at addressing specific policy issues raised by the SDGs.⁴¹ This includes international labour standards that are reflected in SDG 8 and are protected in national labour laws and related laws prohibiting modern slavery and human trafficking.⁴² These are welfarist considerations that proponents of the ‘ignore the law’ approach themselves ignore. Worker regulations therefore instantiate welfarist considerations such that arguing against all welfarist regulations amounts to a self-defeating proposition on the part of proponents of the ‘ignore the law’ position.

Thirdly, the UN Global Compact expressly sees businesses as having certain responsibilities to uphold the rule of law.⁴³ Building on the work already done to strengthen the protection of investments, property rights, contractual rights and legal identity for business as aspects of economic and social development, the UN Global Compact requires the active participation of businesses in the further development of the rule of law.⁴⁴ It makes clear that ‘all societal actors, including businesses, are required to respect the rule of law.’⁴⁵ Respect for universal principles including human rights and anti-corruption is the minimum standard for business behaviour and business must not undermine the rule of law.⁴⁶ Respect for the rule of law entails, among other matters, respecting the ten principles of the UN Global Compact, which include fundamental labour rights. Respect for the rule of law also requires compliance with laws and regulations throughout the company’s operations and value chain, requiring supporting business partners to do the same, complying with tax laws and policies, honouring contractual obligations and commercial agreements and honouring dispute resolution procedures and decisions at all levels.⁴⁷ The position of the UN Global Compact appears unambiguous: in return for the increased protection of legal rights for business, businesses must respect the rights of others and uphold the rule of law as a means to this end.⁴⁸

More recent international investment agreements (IIAs) drawn up by states from the Global South also suggest that, in return for guarantees of investors’ rights, investors should recognise certain social, environmental and human rights goals including labour rights.⁴⁹

⁴¹ *Ibid.*, 251.

⁴² See United Nations Development Programme, ‘Goal 8: Decent Work and Economic Growth’, <https://www.undp.org/sustainable-development-goals/decent-work-and-economic-growth> (accessed 26 January 2024), which includes a commitment to ‘Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms; Protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment’. See too International Labour Organization Decent Work for Sustainable Development Resource Platform, ‘16. Labour Standards’, <https://www.ilo.org/global/topics/dw4sd/themes/standards/lang--en/index.htm> (accessed 26 January 2024). For example English law reflects SDG 8 in the Modern Slavery Act 2015 (UK).

⁴³ United Nations Global Compact, *note 25*.

⁴⁴ *Ibid.*, 6.

⁴⁵ *Ibid.*, 8.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, 9. Indeed the United Nations Global Compact sees business actions that strengthen labor standards as a key aspect of activities that business can take to support the rule of law: *ibid.* at 19.

⁴⁸ As Arnold and Bowie argued 20 years ago, to do otherwise constitutes a ‘pragmatic contradiction’ in that it presumes that the rule of law applies to TNC legal rights but not to the legal rights of workers: Arnold and Bowie, *note 1*, 227–8.

⁴⁹ See, for example, the following African initiatives: the Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria BIT of 2016 (opened for signature 3 December 2016), art 18; the South African Development Community Model Bilateral Investment Treaty Template with Commentary (published July 2012), art 15; and the Draft Pan-African Investment Code of 2016 (PAIC) (drafted December 2016), arts 22 and 24. These IIAs form part of a wider movement among states of the Global South to reform IIAs to offer a balance of rights and obligations for investors:

Furthermore, the 2023 revision of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct asserts that multinational enterprises should respect core labour rights, ‘within the framework of applicable law, regulations and prevailing labour relations and employment practises and applicable international labour standards, avoiding any unlawful employment and industrial relations practises, and in line with due diligence expectations’.⁵⁰

Finally, the actual context in which the regulation of labour conditions in developing countries occurs should be taken into account. The ‘ignore the law’ argument exacerbates the already difficult issues surrounding the operation of law in what are, in many instances, weak governance zones.⁵¹ Firms may be benefitting from the host state’s inability to enforce labour laws which may have its roots in state corruption, administrative neglect, lack of resources, or a combination of these, all factors which serve to undermine the institutional bases of the rule of law. Such states may, in addition, find it hard to absorb new technology and rise on the skills curve towards better-remunerated employment. They are caught in a trap of limited development and the firm is perpetuating this dependence on low-tech, low-skill work based on exploitative working practises.⁵² This may thereby deprive future generations of workers of better employment opportunities. On *welfarist* grounds, therefore, the rule of law ought to be upheld. This conclusion echoes our arguments above and again demonstrates how legal reasoning directly undermines the ‘ignore the law’ position.

The preceding arguments have made the case that the freedom of a business to ignore the law, including labour law, is highly problematic from the perspective of fairness and welfarism. It goes against a growing international consensus on the applicability of the rule of law to business, one that includes a general obligation to comply with laws and regulations both in the operations of the company and in the value chains in which it participates. The weakness of the argument is further exposed when it is analysed in the context of contractual freedom and contracting practises in sectors prone to the use of sweatshops.

III. Contractual Freedom, ‘Ignore the Law’ and Employment Practises in Developing Countries

The ‘ignore the law’ argument uses the freely negotiated contract as the basic justification for holding sweatshop workers to their apparent acceptance of poor working conditions. Powell and Zwolinski claim that ‘The most basic point made by defenders of sweatshops is that workers’ voluntary choice to accept sweatshop employment demonstrates that

see further Sonia E Rolland and David M Trubek, ‘Legal Innovation in Investment Law: Rhetoric and Practice in Emerging Countries’ (2017) 39:2 *University of Pennsylvania Journal of International Law* 355; Markus Krajewski, ‘A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty Application’ (2020) 5:1 *Business and Human Rights Journal* 105.

⁵⁰ Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (Paris: OECD, 2023).

⁵¹ Weak governance zones are defined by the OECD as ‘investment environments in which governments cannot or will not assume their roles in protecting rights (including property rights), providing basic public services (e.g., social programmes, infrastructure development, law enforcement and prudential surveillance) and ensuring that public sector management is efficient and effective. These ‘government failures’ lead to broader failures in political, economic and civic institutions that are referred to as weak governance.’ Organisation for Economic Co-operation and Development, *Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones* (Paris: OECD, 2006).

⁵² See further United Nations Conference on Trade and Development, *World Investment Report 2005: Transnational Corporations and the Internationalization of R&D* (New York and Geneva: United Nations, 2005).

sweatshops were the best alternative available to them.⁵³ The ‘ignore the law’ conception of voluntariness is at odds with the legal notion of contractual freedom insofar as it assumes with certainty that the sweatshop worker’s choice to work in a sweatshop is genuinely free, even if they have no real alternative once the context of their choice is understood. It is impossible to ignore the impact of poverty and maladministration on constraining choices that poor people can make and which render the idea of a freely entered contract somewhat illusory.⁵⁴ This is reinforced by the system of labour contracting that is often used to procure sweatshop labour, discussed in more detail below.

Even if we accept the view that a freely accepted contract of employment is a truly voluntary act on the part of the worker, employment contracts are by their very nature acts of submission to the authority of the employer, even if the employment is highly desirable.⁵⁵ A contract of employment is usually based on standard terms offered by the employer and entails the obligation to follow the employer’s orders, creating a relationship of subordination. This opens the door to employer malpractice and the imposition of onerous and exploitative demands on the employee which they have no option but to accept if they wish to keep their job. This is especially the case in relation to sweatshop work where there may be few, if any, alternative sources of employment allowing the worker to leave.

The structural features of poverty in developing nations where sweatshops are prevalent constrain choices in profound and meaningful ways. By and large, workers lack bargaining power, they cannot refuse to work in dangerous conditions, and they must accept the wages and working conditions provided, regardless of whether legal standards are met. The alternative is unemployment without social safety nets for support. As Kates points out, ‘Sweatshop workers are forced to work in sweatshops because they lack an acceptable alternative to them.’⁵⁶ The alternatives may be understood as unacceptable because they are less compatible with human dignity than sweatshop labour. This choice is constrained by the social structure in which workers find themselves and renders problematic the idea that sweatshop workers freely enter into a contract.

The ‘ignore the law’ argument also raises certain problems in relation to labour law and contract theory. If the contract has the force of law, it is only within an *existing* regulatory framework that includes the panoply of regulations that govern working conditions and wages and benefits (e.g., rules regarding discrimination, severance pay, social security payments, hourly wages, overtime pay, fire safety, chemical exposure, etc.). Employment contracts have evolved from direct bargains between the employer and employee into vehicles for the inclusion of numerous regulatory requirements which seek to protect workers’ rights.

According to Macneil, contractual relations do not exist in a formal vacuum. Rather they arise in the context of human relations occurring within a social matrix of communications understood to the parties as an aspect of their wider social relations.⁵⁷ The employment contract is one of the strongest examples of such a relational contract. As stated by Deakin,

⁵³ Powell and Zwolinski, *note 2*, 451.

⁵⁴ See further Michael Kates, ‘Markets, Sweatshops, and Coercion’ (2015) 13 *Georgetown Journal of Law & Public Policy* 367. See also, Michael Kates, ‘The Ethics of Sweatshops and the Limits of Choice’ (2015) 25:2, *Business Ethics Quarterly* 191–212. Arnold and Bowie, *note 1*.

⁵⁵ See Hugh Collins ‘Is the Contract of Employment Illiberal?’ in Collins, Lester, and Mantouvalou (eds.), *note 9*, 48–67.

⁵⁶ Kates, *note 54*, 378.

⁵⁷ Ian Macneil, ‘Relational Contract Theory as Sociology’ (1987) 143:2 *Journal of Institutional and Theoretical Economics* 272; and see further David Campbell, ‘Ian Macneil and the Relational Theory of Contract’ in David Campbell (ed.), *The Relational Theory of Contract: Selected Works of Ian Macneil* (London: Sweet & Maxwell, 2001).

the model of the open ended or indeterminate employment contract, based on reciprocal commitments of loyalty and security and lodged within a dense network of organizational and societal rules, is in many ways the paradigm case of what Ian Macneil has termed a 'relational' contract. Here the 'classical' contract law of discrete market exchange gives way to a model in which exchange is governed by the 'political and social processes of the relation, internal and external', so that the relation becomes situated within 'a mini-society with a vast array of norms centred on exchange and its immediate processes'.⁵⁸

Thus, employment contracts exist not just between employer and employee but in a relational network of employment practises and laws that include regulatory norms which protect workers, conceived through the extensive experience of labour relations throughout history and across nations. The formative roles of labour law and international labour standards in developing the ethical dimension of these relational practises will be discussed further in the next subsection.

Turning to the system by which labour is procured for sweatshops, the starting point is that the sweatshop regime, as operated in developing countries, is a product of structural factors governing the organisation of Global Production Networks (GPNs).⁵⁹ In particular, the apparel and food sectors have been prone to the use of sweatshop labour due to extreme price competition that has led to business models based on minimal labour costs which can be provided by developing country locations.⁶⁰ This cost-cutting trend is enhanced by the practise of labour contracting.

According to Barrientos, the rise of labour contracting is a major driver behind the employment impacts of GPNs. She notes that 'there is no commonly agreed definition of labour contracting. It is associated with what the ILO terms a 'triangular employment relationship', where the legal employer is separate from the person for whom work is carried out.'⁶¹ Usually, the labour intermediary or contractor,

supplies workers to a producer on the basis of a contract for a specific task, for which payment is made (for example, clearing a field or embellishing a batch of garments); the agent or contractor pays the workers and supervises their work. There is no direct contractual relation between worker and producer, only with an intermediary.⁶²

Labour contractors extract an economic rent or profit for their service.⁶³ Barrientos notes that rent is paid by the producer, but it opens up space for abuse of the employment relationship:

This abuse can occur through a combination of reasons: (a) the price paid to the labour contractor is insufficient to cover the costs of wage and non-wage benefits; and/or

⁵⁸ Simon Deakin, 'The Many Futures of the Contract of Employment' in Joanne Conaghan, Richard Michael Fishl and Karl Klare (eds.), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2004) 181.

⁵⁹ See further Juliane Reinecke et al, *Business Model and Labour Standards: Making the Connection* (London: Ethical Trading Initiative, King's College London and the University of Warwick, 2019).

⁶⁰ Ibid, 18–24. See also Florian Wettstein, *Business and Human Rights: Ethical, Legal and Managerial Perspectives* (Cambridge: Cambridge University Press, 2022) 335–46.

⁶¹ Stephanie Barrientos, 'Labour Chains': Analysing the Role of Labour Contractors in Global Production Networks' (2013) 49:8 *Journal of Development Studies* 1,058–9.

⁶² Ibid, 1,060.

⁶³ Ibid, 1,066.

(b) more unscrupulous contractors extract an additional surplus, through coercion of the workers. When (a) prevails alone, this is likely to lead to abuse of workers' rights (wages below the minimum wage, non-receipt of statutory benefits). When (b) also prevails, this leads to situations of unfree labour. Workers are no longer able to exit the grip of a labour contractor or intermediary, and the labour for which they are supplied to the producer becomes effectively involuntary. The labour contracting system is therefore integral to the flexible commercial functioning of GPNs across borders in a liberalised global economy. It also provides a channel for the entry of unfree labour into the heart of global production.⁶⁴

The situation described by Barrientos arises mainly, but not exclusively, in developing countries.⁶⁵ Developed countries are not immune from the risk of sweatshops. For example, in the UK city of Leicester, the local textile industry, decimated by the relocation of major manufacturers to lower-cost host countries, still survives but has given rise to so-called 'dark factories' which operate illegally by flouting minimum labour standards, creating sweatshop conditions.⁶⁶ Thus the cost-cutting drivers behind GPNs can affect the quality of working conditions worldwide.

From the above, it is hard to see how a system of labour contracting, which diminishes the free agency of the worker, and subjects him, or her,⁶⁷ to the risk of abusive working conditions, can be explained in the context of contractual freedom. There is a very strong likelihood that the employment in question is not freely entered into. As Kates argues:

it seems quite clear that the reason why sweatshop workers are forced to work in sweatshops ... is that poverty reduces the options of sweatshop workers to a small list of unacceptable ones and gets them to choose an option they would otherwise not choose, namely sweatshops.⁶⁸

To summarise, the 'ignore the law' argument could be said to amount to a general dislike of regulation on the grounds that this increases costs and undermines apparently voluntary contracts.⁶⁹ The 'ignore the law' argument also ignores the changing nature of the employment relationship in the current era of globalisation. This undermines key assumptions about contractually based employment, given the more fluid conception of work and workers that globalisation entails, and ignores the fact that working conditions in all countries are being challenged by transnational capital.⁷⁰ In this context, the approach of labour law and international labour rights protection is also changing. However, as will be

⁶⁴ Ibid.

⁶⁵ Ibid. Barrientos focuses on labour contracting in the South African and UK horticultural industries.

⁶⁶ See Sarah O'Connor, 'Dark factories: labour exploitation in Britain's garment industry', *FT.Com* (17 May 2018), <https://www.ft.com/content/e427327e-5892-11e8-b8b2-d6ceb45fa9d0> (accessed 26 January 2024); Nikolaus Hammer et al, *New industry on a skewed playing field: supply chain relations and working conditions in UK garment manufacturing. Focus area - Leicester and the East Midlands* (Leicester: University of Leicester, 2015).

⁶⁷ On gender and the use of contract labour in sweatshops see further Alessandra Mezzadri, 'Class, gender and the sweatshop: on the nexus between labour commodification and exploitation' (2016) 37:10 *Third World Quarterly* 1877.

⁶⁸ Kates, note 54, 380.

⁶⁹ Powell and Zwolinski, note 2, 457. For criticism of this view see Joshua Preiss, (2019), note 6.

⁷⁰ See Bob Hepple, *Labour Laws and Global Trade* (Oxford: Hart Publishing, 2005) 1–13; Harry Arthurs, 'Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture' (2001) 22:2 *Berkeley Journal of Employment & Labor Law* 271, 281–5; Yossi Dahan, Hanna Lerner and Fania Milman-Sivan, 'Global Labor Rights as Duties of Justice' in Yossi Dahan, Hanna Lerner and Fania Milman-Sivan (eds.), *Global Justice and International Labour Rights* (Cambridge: Cambridge University Press, 2016) 53.

shown in the next section, it is a change that reemphasises the need for an agreed core of fundamental labour rights that can act to prevent worker abuse wherever it occurs. This core of rights not only provides positive legal obligations but offers a moral and ethical code of conduct for businesses to follow, encapsulated in the ILO's concept of 'decent work,' and thus ensures the observance of workers' fundamental human rights and dignity.

IV. The Impact of Labour Law and International Labour and Human Rights Standards: Decent Work

Both national labour laws and international labour rights have a long history.⁷¹ Both seek to remedy the unequal bargaining power between the worker and employer in the employment relationship through regulation that creates legal standards which inform the limits of contractual freedom and protect the worker against exploitation. Labour regulation seeks not only to improve the efficient and fair operation of contracts of employment but also the consequential improvement of the position of poorer members of society.⁷² This requires institutional structures, such as the freedom to form and join trade unions and collective bargaining, that further the process of balancing worker and employer power and so enhance social justice.

This description of labour law and international labour standards is the one most commonly found in standard accounts of the field. However, beyond noting the aim of social justice, it does not fully address the ethical and moral foundations of this field nor the changing context in which it is evolving.⁷³ Once these further elements are considered a stronger case can be made that ignoring labour law and international labour standards by business is incompatible with the ethical and moral foundations of a just national and global society.

It is instructive to begin by discussing the original aims of the International Labour Organisation (ILO) created in 1919 under the Treaty of Versailles. The Preamble to the ILO Constitution offers two main justifications for establishing this organisation. First, the attainment of global peace through social justice noting that

conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled and an improvement of those conditions is urgently required ...⁷⁴

Secondly, the need for all nations to adopt humane working conditions adding that

the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries ...⁷⁵

⁷¹ See further on the history of UK labour law, Roy Lewis, 'The Historical Development of Labour Law' (1976) 24:1 *British Journal of Industrial Relations* 1; Bob Hepple (ed.), *The Making of Labour Law in Europe: a Comparative Study of Nine Countries up to 1945* (London: Mansell, 1986); Derek C Bok, 'Reflections on the Distinctive Character of American Labor Laws' (1971) 84:6 *Harvard Law Review* 1394; on the history of international labour law and the ILO see Hepple, note 70, 25–35.

⁷² See Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) 137.

⁷³ See for an illuminating discussion, Brian A Langille, 'What Is International Labor Law for?' (2009) 3:1 *Law and Ethics of Human Rights* 48.

⁷⁴ Preamble to the ILO Constitution 1919 (established in 1919, modified by the Instrument of Amendment of 1997 and entered into force on 8 October 2015). available at http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::No:62:P62_LIST_eNtrle_ID:2453907:No (accessed 26 January 2024).

⁷⁵ *Ibid.*

The signatories saw international labour standards as a key element in human development and that their adoption had to occur everywhere to avoid obstacles to states adopting such standards. Underlying this aim is an understanding that labour rights come at a cost to producers and that this can lead to a ‘race to the bottom’ in standards.⁷⁶ Thus far the ILO Constitution appears to accept the premise of the ‘ignore the law’ position that observing labour standards entails costs.

However, it does not envisage accepting a lowering of standards by business as the answer to human development, rather the opposite.⁷⁷ This is in part because the evidence for a positive link between economic growth and low labour standards is weak—indeed higher labour standards tend to go hand in hand with growth.⁷⁸ Furthermore, the first proposition in the ILO Constitution, which equates good labour conditions with social peace and justice, gives international labour standards a moral force. It places good working conditions on a constitutional plane as a core political and social goal that cannot be diminished in the pursuit of short-term profit for the employer. In the words of Brian Langille

The project of international labor law is to lead member states to pursue their self-interest through the construction of social policies which are part of the complex and mutually supporting aspects of human freedom which both make possible the construction of just and durable societies and are their goal. This is a positive, coherent, integrated, and radical account of the mission of the ILO and of international labor law.⁷⁹

In this sense, labour rights are linked with human rights as a means of enhancing human dignity and require the state to meet its obligations to respect, protect, fulfil and promote fundamental human rights as a positive developmental goal.⁸⁰

The ‘ignore the law’ approach to labour laws includes the implied rejection of international labour standards. It is, of course, easy to dismiss these standards as the product of an increasingly irrelevant organisation and as a source of cost barriers to the creation of new job opportunities which can be equally well ignored.⁸¹ Indeed, this was a major reason behind the US withdrawal from the ILO in the 1970s, as neo-liberal economic ideas began to take root.⁸² Even since its return to the ILO in 1980, the US has not ratified all of the core ILO Conventions. However, this does not mean the US has rejected the significance of labour standards.⁸³ On the contrary, the US continues to monitor labour standards and include worker protection clauses in its trade agreements as an integral

⁷⁶ See Langille, note 73, 62.

⁷⁷ See for the economic case in favour of core labour standards Thomas I Palley, ‘The Economic Case for International Labour Standards’ (2004) 28:1 *Cambridge Journal of Economics*, 21.

⁷⁸ Langille note 73, 70–1.

⁷⁹ Langille, note 73, 76. Langille relies on Sen’s concept of development, see further Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 2001).

⁸⁰ See further Pablo Gilibert, ‘Dignity at Work’ in Collins, Lester, and Mantouvalou (eds.), note 9, 68–86; Pablo Gilibert, ‘Labor human rights and human dignity’ (2016) 42:2 *Philosophy & Social Criticism* 171; Joe Atkinson, ‘Human Rights as Foundations for Labour Law’ in Collins, Lester, and Mantouvalou (eds.), note 9, 122–38.

⁸¹ See Guy Standing, ‘The ILO: An Agency for Globalization?’ (2008) 39:3 *Development and Change* 355.

⁸² See Guy Standing, ‘The International Labour Organisation’ (2010) 15:2 *New Political Economy* 307.

⁸³ The United States has ratified 14 of the ILO’s 189 ILO Conventions, including two of the ILO’s eight fundamental conventions: No. 105 on the Abolition of Forced Labor and No. 182 on the Elimination of the Worst Forms of Child Labor; International Labour Organisation, ‘The US: a leading role in the ILO’, <https://www.ilo.org/washington/ilo-and-the-united-states/the-usa-leading-role-in-the-ilo/lang--en/index.htm> (accessed 26 January 2024).

aspect of its trade policy.⁸⁴ Thus, whatever one may think of the ILO and its limitations, the core standards it has produced remain salient to the issue of global social justice even for the world's most market-oriented state.

In 1998, the ILO adopted one of the most significant statements of core, globally accepted, labour standards through the Declaration of Fundamental Principles and Rights at Work. This has constitutionalised certain fundamental labour rights contained in ILO Conventions. By paragraph 2 of the Declaration as amended in 2022:

2.[...] all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour;
- (d) the elimination of discrimination with respect to employment and occupation;
- (e) a safe and healthy working environment.⁸⁵

The extension of the obligation to observe these core rights to all members, even if they have not ratified one or more of the ILO Conventions outlining the core freedoms listed in paragraph 2, is a major development. It presumes a level of consensus over these core rights that transcends formal legal procedures and emphasises their constitutional status as fundamental rights.

This 'core rights' approach was further enhanced by the ILO 'Decent Work Programme'.⁸⁶ Decent work is defined by the ILO and endorsed by the international community as

productive work for women and men in conditions of freedom, equity, security and human dignity. Decent work involves work opportunities that are productive and deliver a fair income; provides security in the workplace and social protection for workers and their families; offers prospects for personal development and encourages social integration; gives people the freedom to express their concerns, to organize and to participate in decisions that affect their lives; and guarantees equal opportunities and equal treatment for all.⁸⁷

Decent work is to be achieved through four strategic objectives in which labour law and regulation play a significant part.⁸⁸ These include, first, promoting employment in a sustainable institutional and economic environment, and, secondly, developing and enhancing sustainable social security and labour protection adapted to national circumstances. The third element involves promoting social dialogue while the fourth

⁸⁴ See Cathleen D Cimino-Isaacs, *Worker Rights Provisions and U.S. Trade Policy* (Washington: Congressional Research Service, 2021).

⁸⁵ See ILO Declaration of Fundamental Principles and Rights at Work at Fundamental Principles and Rights at Work (adopted 18 June 1998, amended 10 June 2022).

⁸⁶ See International Labour Organization, 'Decent Work', <http://www.ilo.org/global/topics/decent-work/lang-en/index.htm> (accessed 26 January 2024). For a critical perspective see Standing, notes 81 and 82.

⁸⁷ International Labour Organization, *Toolkit for Mainstreaming Employment and Decent Work* (Geneva: ILO, 2008) vi.

⁸⁸ *Ibid.*, vii–viii.

element requires respecting, promoting and realising the fundamental principles and rights at work. In particular, freedom of association and the effective recognition of the right to collective bargaining are highlighted. Furthermore, the violation of fundamental principles and rights at work, ‘cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes.’⁸⁹

As Langille notes, the core rights approach underlying the decent work programme offers a means by which the individual can pursue their freedom in that they list the main barriers to the realisation of that freedom in the workplace.⁹⁰ The concept of core labour rights, as contained in the ILO Declaration, is indispensable for extending protection to workers in the informal economy, who are not covered by any formal employment contract, the usual source of labour rights protection.⁹¹

The core labour rights concept has had a significant impact on business responsibilities in relation to human rights. Thus, the thousands of corporations that have signed on to the UN Global Compact are expected to observe the core labour rights contained in the ILO Declaration,⁹² and observance of these core labour rights is central to the UN Guiding Principles on Business and Human Rights.⁹³ The key here is the stress placed upon freedom of association and collective bargaining as a fundamental labour right.⁹⁴ It is the root of labour power to improve labour conditions.⁹⁵

Equally, the responsibility of the state to uphold international labour standards is part of a wider obligation to protect human rights. This has been recognised in regional human rights tribunals. For example, the Inter-American Court of Human Rights has held in a series of cases, based on the provisions of the UN Guiding Principles and ILO core labour rights, that the state has a duty to protect the fundamental labour rights of workers within its jurisdiction who face conditions of precarity and marginalisation making them liable to exploitation through poor pay and harsh and dangerous working conditions.⁹⁶ The European Court of Human Rights (ECtHR) has also upheld claims against states who have failed to protect workers’ rights having used the prohibition against slavery and forced labour in Article 4 of the European Convention on Human Rights, the right to form and join a trade union under Article 11 and the right to private life under Article 8 as springboards for a more integrated interpretation that extends the scope of the ECHR to other workers’

⁸⁹ Ibid.

⁹⁰ See further Brian Langille, ‘Core Labour Rights – The True Story (Reply to Alston)’ (2005) 16:3 *The European Journal of International Law* 409, 432–5. Langille criticizes Philip Alston’s view that the ILO Declaration is a retrograde step which undermines the ILO system of international labour rights. See Philip Alston, ‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime’ (2004) 15:3 *The European Journal of International Law* 457.

⁹¹ Langille (2005), note 90, 435–6.

⁹² See UN Global Compact Principles 3–6 at UN Global Compact, ‘The Ten Principles of the UN Global Compact’, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed 26 January 2024).

⁹³ Human Rights Council, note 8. See further Yossi Dahan, Hanna Lerner and Faina Milman-Sivan, ‘The Guiding Principles for Business and Human Rights: Labor Violations and Shared Responsibility’ (2016) 32:4 *International Journal of Comparative Labour Law and Industrial Relations* 425.

⁹⁴ Thus, the UNGPs, list the core labour rights in the ILO Declaration as part of the core human rights standards that business enterprises ought to observe: see Human Rights Council, note 8, principle 12.

⁹⁵ See further Gary Chartier, ‘Sweatshops, Labor Rights, and Competitive Advantage’ (2008) 10 *Oregon Review of International Law* 149.

⁹⁶ See Sebastián Smart, ‘Expanding and Contracting the UN Guiding Principles: an Analysis of Recent Inter-American Human Rights Court Decisions’ (2023) *Journal of Human Rights Practice*. See especially *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v Brazil*. Judgment of July 15, 2020 at https://www.corteidh.or.cr/docs/casos/articulos/seriec_407_ing.pdf (accessed 26 January 2024).

rights.⁹⁷ In coming to these decisions the ECtHR has had recourse to the ILO materials. Notably, the Court has held that extremely harsh working conditions and human trafficking of workers amount to violations of Article 4 as cases of ‘modern slavery.’⁹⁸

These cases suggest a more general moral principle that it cannot be consistent with personal freedom to accept the submission of a person, suffering structural inequalities characterised by an absence of good alternatives, to a situation of unfree labour. As noted earlier, Powell and Zwolinski have always drawn a line between slavery, forced labour and freely chosen but onerous labour. However, where precisely that line exists must be a matter for which guiding rules are set. In this sense labour law and international labour standards offer basic ground rules that can be applied judicially, and thus authoritatively, to determine where the line between acceptable and unacceptable working conditions should be drawn in a given case. In this way, legal rules become instruments of moral analysis based on considered views of what is right and wrong.

Equally, these judgments emphasise the fundamental nature of human rights and the state’s responsibility to protect them. States have a legal duty to protect non-state actors and individuals against violations of their rights by other non-state actors or individuals under the ‘horizontal effects’ principle. The Inter-American Court of Human Rights stated, in the case of *Velásquez Rodríguez vs. Honduras*, that

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.⁹⁹

The existence of this principle implies that private actors do have at least the duty not to violate the human rights of others.¹⁰⁰ In this light, it is incorrect to suggest that corporate actors can ‘ignore the law’ that demands their conformity with fundamental labour rights when the states in which they do business cannot opt out of their legal duties to make them do so and where they may be furthering social justice and development goals through law. This effectively negates any right on the part of a corporate actor to ignore labour standards that embody fundamental human rights.

Finally, even assuming that an employer should be maximally free to do as they want in pursuit of profit the moral imperative of observing the rights of others, including workers, remains a core liberal value.¹⁰¹ This value lies at the heart of the development, through the UN Guiding Principles, of the corporate responsibility to respect human rights. This is operationalised through the undertaking of human rights due diligence (HRDD) by the business with the aim of identifying and avoiding, or at least mitigating, negative human

⁹⁷ See Virginia Mantouvalou, ‘Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation’ (2013) 13:3 *Human Rights Law Review* 529.

⁹⁸ See *Siliadin v France* 73316/01 (2005); *Rantsev v Cyprus and Russia* 25965/04 (2010); noted in Jean Allain, ‘Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery’ (2010) 10:3 *Human Rights Law Review* 546.

⁹⁹ *Velásquez Rodríguez v Honduras* (1988) Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) para 172.

¹⁰⁰ See further Ralph G Steinhardt, ‘Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*’ in Philip Alston (ed.), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 177.

¹⁰¹ John Stuart Mill reminds us, ‘The only freedom which deserves its name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.’ John Stuart Mill, *On Liberty* (1859) republished in Mary Warnock (ed.), *Utilitarianism: John Stuart Mill* (Glasgow: Collins/Fontana, 1975) 138.

rights impacts arising out of the business's activities.¹⁰² HRDD thus takes a familiar business process—due diligence—and turns it from a device used to identify commercial risks to the business into a tool for the identification and avoidance of human rights risks to persons and groups who are foreseeably at risk of human rights infringements arising out of business activities. This includes human rights risks to employees and other workers in global supply chains from whose labour the business profits.

In the words of the progenitor of the UNGPs, the late John Ruggie, the corporate responsibility to respect human rights is now a 'transnational social norm' recognised as such by governments, civil society and businesses in their corporate responsibility commitments.¹⁰³ To the extent that labour rights and human rights coincide their observance may be demanded as an aspect of this norm. It is also demanded by the need for businesses to act as legitimate and positive contributors to the communities in which they work. Business actors have a 'social licence to operate' (SLO) in the communities where they do business.¹⁰⁴ The SLO involves an understanding that a business operates in a community on the basis of its social acceptance or approval earned through 'consistent and trustworthy behaviour and interactions with stakeholders.'¹⁰⁵ Unlike a legal obligation, the SLO is granted by the community and is based on the values, perceptions and expectations of various local stakeholders. It is thus more socially rooted, and, unlike a legal licence whose terms are settled upon conclusion, it is a continuing process based on dialogue. Corporate compliance with core labour rights and other human rights may be rightly seen as an element of the SLO in that a commitment to upholding labour standards and human rights can be seen as a corporate reflection of core social values regardless of their formal legal status under the law of the place of operations and one which the corporation has the power to observe as a matter of its own sense of social obligation.

That said, the transnational norm of corporate respect for human rights is increasingly given legal force through mandatory national human rights due diligence laws.¹⁰⁶ These are far from perfect instruments in ensuring corporate observance of human rights, not least because they focus on corporate reporting responsibilities rather than liability for wrongful acts and demand only reasonable compliance with HRDD processes.¹⁰⁷ However, they represent a further example of using law to create expectations of ethical and responsible business conduct within the context of commercial operations and are a significant departure from the historical view that corporate actors need not consider their human rights responsibilities as a normal part of their business decision-making.¹⁰⁸

V. Conclusion

To conclude, the 'ignore the law' argument appears flawed when contrasted with the demands made of businesses to respect the rule of law as part of the development

¹⁰² For an overview of HRDD and the corporate responsibility to respect human rights see Muchlinski, [note 8](#), 100–18.

¹⁰³ John Gerald Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W. W. Norton & Company, 2013) 76. See also, Denis G Arnold, *The Ethics of Global Business* (Hoboken and West Sussex: Wiley, 2023).

¹⁰⁴ See further John Morrison, *The Social License: How to Keep Your Organisation Legitimate* (Basingstoke: Palgrave MacMillan, 2014); Leeora Black, *The Social License to Operate: Your Management Framework for Complex Times* (London: Routledge, 2013); Kieren Moffat et al, 'The social licence to operate: a critical review' (2016) 89:5 *Forestry* 477.

¹⁰⁵ Black, *ibid* at 18.

¹⁰⁶ See Muchlinski, [note 8](#), 84–7 and 151–8.

¹⁰⁷ See Surya Deva, 'Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?' (2023) 36 *Leiden Journal of International Law* 389.

¹⁰⁸ See further Peter Muchlinski, 'The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights' (2021) 6:2 *Business and Human Rights Journal* 212.

process, when analysed in the context of contractual freedom and the structural reality of labour markets encouraging sweatshop conditions in developing and, indeed, even in developed countries, and when the role of labour law and international labour standards, in providing an ethical and moral framework of rules protecting workers against abuse as an aspect of international social justice and sustainable development, is taken into account. The 'ignore the law' position is thus open to a great deal of doubt from a legal and developmental perspective. Poverty is a multifaceted phenomenon that is impacted by a variety of institutions. Transnational firms play an important role in supplying foreign direct investment and formal employment in developing nations. However, poverty reduction requires the support of both private and public actors all of whom share a responsibility to mitigate structural conditions that lead to unfair and undignified working practises and who bear a degree of liability, both moral and legal, should they act to perpetuate them.¹⁰⁹ Advocating ignoring labour laws and core international labour standards is a distraction from the important work of institution building that is needed to protect workers and facilitate economic growth in a manner consistent with decent work, sustainable development, fairness and human dignity.

¹⁰⁹ See further Yossi Dahan, Hanna Lerner and Faina Milman-Sivan, 'Shared Responsibility and Labor Rights in Global Supply Chains' (2023) 182 *Journal of Business Ethics* 1025.

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